



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 13, 2023

IN THE MATTER OF:

Appeal Board No. 629462

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective February 14, 2023, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by ABILITIES FIRST INC prior to February 14, 2023 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant. By decision filed May 17, 2023 (A.L.J. Case No. ), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** the claimant worked for the employer, an organization that provides services to the developmentally disabled, as a direct care support staff member for 25 years, until February 9, 2023. The claimant was a member of a union in contract with the employer. His duties included transporting individuals who were receiving services from the employer. The claimant was aware of the employer's policy which provides that an employee may be discharged after testing positive for the use of illegal substances and that drug tests may be administered following accidents. The claimant had been in several accidents during the course of his employment but was never subjected

to a drug test following any of them.

On February 1, 2023, the claimant drove into a glass storefront while operating the employer's vehicle, breaking the glass and causing damage to the vehicle. No one else was in the vehicle. The police did not issue any tickets to the claimant but the employer sent him to be tested for drugs. The test returned a positive result for marijuana and cocaine. The claimant does not use cocaine although he does smoke marijuana.

The employer subsequently notified the claimant that he was being discharged because he had tested positive for the use of cocaine. The employer and the claimant's union subsequently entered into a separation agreement under which the claimant gave up his right to grieve his discharge and the employer agreed to not contest his claim for Unemployment Insurance benefits.

OPINION: The record before us does not establish that the claimant intentionally ingested cocaine prior to receiving a positive drug test result. While he does not dispute the drug test result, he does deny deliberately using cocaine. We note that the employer declined to appear in this matter to refute the claimant's testimony. Under these particular and specific circumstances, there is insufficient evidence of misconduct on the claimant's part for Unemployment Insurance purposes. Accordingly, it is concluded that the claimant's employment ended under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER